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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 461

CATAHOULA BANK,

Petitioner,

vs.

LEON KIRBY, DEBTOR.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

WOOD H. THOMPSON,
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Counsel for Petitioner.

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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

MAY IT PLEASE THE COURT:

The petition of Catahoula Bank respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

The manner in which this litigation arises is as follows:

On February 28, 1938, Leon Kirby, respondent herein, sold, conveyed, and transferred to the Catahoula Bank, petitioner, by a notarial act of sale, which appears in full at

pages 11-14 of the Record, the property which is involved in this litigation consisting of some four hundred eighty (480) acres of land in Catahoula Parish for the consideration of the assumption by the Bank of certain encumbrances against the property aggregating \$8,344.35 and consisting of a mortgage to the Federal Land Bank upon which the amount due at the time of the transfer, including delinquent interest, was acknowledged to be \$6,344.35 and a second mortgage in favor of the vendee bank in the principal sum of \$2,500.00 upon which the unpaid balance then past due was acknowledged to be the sum of \$2,500.00.

On the same day, February 28, 1938, Leon Kirby and the Catahoula Bank entered into a separate written contract (R. 14-17) wherein it was acknowledged that in purchasing the property the Bank had assumed the payment of the Federal Land Bank mortgage of \$6,344.31 and the payment of the indebtedness to itself amounting to \$2,500.00 and in addition was required to pay the sum of \$1,066.19 in order to secure the cancellation of certain judgment encumbrances affecting said property, the whole of which, amounting to the total sum of \$9,910.50, was acknowledged to be the consideration for said transfer and sale.

By this contract the parties further agreed that the property should be leased and rented to Leon Kirby for the calendar year 1938 in consideration of his agreement to pay all taxes accruing against said property for that year, to preserve and properly care for said property during the term of the lease, and to deliver full and complete possession thereof to the Bank on December 31, 1938. In this lease agreement Leon Kirby specially waived any and all legal notices to vacate said property on December 31, 1938 and specially acknowledged the Bank's absolute right, and irrevocably authorized the Bank to do so, to enter upon and take full and complete possession of said property on and after January 1, 1939, without further notice or legal

process and specially granted the Bank full and complete immunity for any damage to himself because of such entry and possession.

In this written contract it was further agreed that during the life of the lease therein granted and until December 31, 1938, the Bank gave and granted to Leon Kirby, his heirs and assigns the right and option to repurchase the aforesaid property and bound and obligated itself to sell the same to him, his heirs or assigns upon the payment to it by him of the full amount of the indebtedness enumerated in that act (viz: \$9,910.50) which had been assumed by the Bank as the purchase price in the aforesaid sale, together with all interest upon said amount at the rate of eight (8%) per cent per annum from January 1, 1938, together with all costs and expenses incurred and paid by said Bank on said property on and after the date of this instrument.

The intended purpose of this agreement was recited as being to permit the said Kirby to repurchase said property at any time on or before December 31, 1938, upon his reimbursing the Bank all money invested in said property by the Bank together with interest, as aforesaid, thereon.

It was further agreed, however, that in effecting a repurchase of said property within the period stipulated by that contract, said Kirby would be permitted to assume as part of the consideration to be paid by him any unpaid balance that might be due and owing on the mortgage encumbrance to the Federal Land Bank if the same had not been paid and discharged in full, but it was specially provided that all other considerations should be paid in cash.

This contract concludes with the specific provision that the option and right to repurchase, as therein granted, should expire on and after December 31, 1938, after date.

Leon Kirby did not comply with any of the obligations imposed upon him by this contract nor avail himself of any of the rights granted him therein but on or about December

20, 1938, instituted his proceeding for relief under Section 75 of the National Bankruptcy Act and in doing so included in the schedules of his property the particular tract of 480 acres which he had deeded to the Bank in this deed of February 28, 1938, and which he was then occupying under the lease agreement included in their contract of the same date. And in an effort to vindicate the claim which he was making to this property he filed a petition in which he made application for an order granting him an extension of time within which to redeem this property from the Bank for the period of time necessary for him to avail himself of the provisions of Section 75 of the Bankruptcy Act, and sought to enjoin and restrain the Bank from interfering with him or ejecting him from said property or disposing of the same pending his proceeding under Section 75. This petition is copied in full on pages 4-6 of the Record.

On or about February 22, 1939, the Bank filed an answer to this application wherein it denied Kirby's right to the relief which he was seeking and, having annexed to its answer copies of the original deed and the original contract hereinabove referred to, it took the position that all rights which Kirby might once have exercised under this contract had expired on December 31, 1938, and that his application should be dismissed and his demands as presented therein rejected.

The Bank in its answer further specially averred that a contract such as is here presented does not fall within the purview of Section 75 of the National Bankruptcy Act which purports to authorize the extension by the courts of periods of redemption and further pleaded that if said Act were intended by Congress to apply to a contract of this nature, then in so doing the Congress had exceeded its bankruptcy powers and that the provisions of Section 75 to that extent were unconstitutional as being violative of the due process

and other clauses of the Federal Constitution. The Bank's answer appears in full at pages 7-11 of the Record.

On these issues the application was heard.

The hearing before the Supervising Conciliation Commissioner which was held on March 4, 1939 resulted in a written report made by the Supervising Conciliation Commissioner and rendered on June 12, 1939 wherein he denied the Bank's contentions and recommended that the application made by Kirby be allowed as prayed for. This report appears in full in the record at pages 1-28 and in this report the Supervising Conciliation Commissioner set out in full Kirby's application, the Bank's answer, and the deed and contract which are the subject of this litigation, all of which have been hereinabove referred to in the course of this statement.

Exceptions to this report and these recommendations were duly taken by the Bank and in due course the matter was reviewed by the District Judge who on September 7, 1939 by written opinion (R. 29-30) adopted in full the findings of fact and recommendations as to the law which had theretofore been made by the Commissioner.

Judgment was duly signed on October 23, 1939 (R. 30-32) and an appeal was taken by the Bank to the United States Circuit Court of Appeals for the Fifth Circuit.

In an opinion handed down May 28, 1940 (R. 42-45) the Circuit Court of Appeals affirmed the judgment appealed from. An application for rehearing (R. 46-49) was duly filed and on July 8th, 1940 an order was entered (R. 50) denying this application.

Petitioner claims error in the opinion and ruling of the Circuit Court of Appeals, as well as of the District Court, and seeks relief through the supervisory jurisdiction of this Court.

B.

Reasons Relied On for the Allowance of the Writ.

In invoking the supervisory jurisdiction of this Court and seeking a review by this Court of the opinion and judgment of the United States Circuit Court of Appeals for the Fifth Circuit, your petitioner shows:

1. That in reaching its decision the Circuit Court of Appeals failed to follow the Statutory law and jurisprudence of Louisiana in construing the contract of February 28, 1938 and determining the respective rights and obligations of the parties thereunder, and on the contrary placed upon that contract a construction which is wholly unknown to the Louisiana law.

2. That under the Statutory law and jurisprudence of Louisiana, which, under the Constitution and Statutes of the United States as construed by the jurisprudence of this Court, the courts of the United States are bound to follow, the Circuit Court of Appeals was bound to hold that the contract of February 28, 1938 constitutes either an option to repurchase or the reservation of the Statutory right of redemption provided for by *Article 2567, et seq. of the Revised Civil Code of Louisiana* with the necessary consequence *in either event* that its term cannot be extended under the Bankruptcy power of Congress and under the provisions of the National Bankruptcy Act, as amended, particularly Section 75 (n) thereof.

3. That in thus failing to follow the Statutory law and jurisprudence of Louisiana, and in thus giving to the contract now in question an anomalous character, not recognized or sanctioned by the Louisiana law and jurisprudence, and in denying to the contract any effect, either as an option to repurchase or as a reservation of the Statu-

tory right of redemption, the said Circuit Court of Appeals has placed the redemptive rights accorded by the contract within a category which is not supported by any provision of the Louisiana law, Statutory or otherwise, and has, therefore, decided an important question of local law in a way which is in direct conflict with applicable local decisions.

4. That the Circuit Court of Appeals erred in holding that the contract of February 28, 1938 and the rights and obligations of the respective parties thereto fall within the intendment of the provisions of the National Bankruptcy Act, as amended, and particularly Section 75 (n) thereof, and that the extension of the period of redemption as provided for by Section 75 (n) of the National Bankruptcy Act was intended to apply to a contract such as is now under consideration.

5. That if by the terms of the National Bankruptcy Act, as amended, and particularly Section 75 (n) thereof, the Congress intended to authorize the extension of the term of, or the enlargement, alteration, or abrogation of any of the contractual rights conferred by such a contract as is now in question and to permit an interference with petitioner's right to the possession of the property now in litigation, then in such event the Congress of the United States has gone beyond and exceeded the bankruptcy power conferred upon it by the Federal Constitution, and as a consequence the National Bankruptcy Act, as amended, and particularly Section 75 (n) thereof, insofar as it might purport to authorize the extension of the term of said contract, or any enlargement or alteration of its provisions, or any interference with petitioner's right to retake possession of the property covered by said contract, is in direct conflict with the Constitution of the United States, and particularly Amendment V thereof, and constitutes the tak-

ing of your petitioner's property without due process of law; and the United States Circuit Court of Appeals erred in not so holding.

6. That in any event the Circuit Court of Appeals erred in holding that the leasehold rights accorded Leon Kirby by said contract of February 28, 1938, which was admittedly the sole title under which Kirby enjoyed *possession* of the land in question, could be extended under the provisions of the National Bankruptcy Act, as amended, and in holding that petitioner's right to retake possession of the land in question upon the expiration of said lease on December 31, 1938 could be interfered with or deferred by the Bankruptcy Courts under the powers conferred by the National Bankruptcy Act, as amended, particularly Section 75 (n) thereof.

7. That from the above reasons it will be readily seen that the Circuit Court of Appeals in this case has decided, as we submit erroneously, important questions of Federal law which have not been, but should be, settled by this Court.

8. That your petitioner re-urges, and re-affirms in this petition all of the assignments of error urged on its original appeal, as shown in the statement of points relied on, appearing at pages 37-40 of the record, as well as those urged in its petition for rehearing, as shown on pages 46-49 of the record.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the said United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named,

a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9433, *Catahoula Bank, Appellant*, versus *Leon Kirby, Debtor, Appellee*, and that said decree and judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

CATAHOULA BANK,
By WOOD H. THOMPSON,
THOS. W. LEIGH,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 461

CATAHOULA BANK,

Petitioner,

vs.

LEON KIRBY,

Debtor.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

MAY IT PLEASE THE COURT :

I.

The Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 112 Fed. (2d) 124, Advance Sheet of July 8th, 1940.

II.

Jurisdiction.

1. The statutory provisions believed and relied upon to sustain the powers of this Court to grant this petition are:

Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, 28 U. S. C. A., Sec. 347, 43 Stats. 938; and also

Sec. 24, para. (c) of the National Bankruptcy Act, as amended by the Act of June 22nd, 1938, 11 U. S. C. A., Sec. 47.

2. The date of the judgment to be reviewed is May 28th, 1940 (R. 42-45); a petition for rehearing (R. 46-49) was duly filed on June 17th, 1940; and such petition was denied on July 8th, 1940 (R. 46).

3. This is a proceeding in bankruptcy involving an attempt by respondent, Leon Kirby, to invoke the provisions of Sec. 75 (n) of the National Bankruptcy Act as amended. The record shows that the property in controversy has a value far in excess of Five Hundred and No/100 (\$500.00) Dollars; the right of appeal to the United States Circuit Court of Appeal is specially granted by Sec. 24, paras. (a) and (b) of the National Bankruptcy Act, as amended (11 U. S. C. A., Sec. 47) reading as follows:

“Sec. 24 Jurisdiction of Appellate Courts—a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the Jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: *Provided further,* That when any order, decree, or judgment involves less than \$500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.”

And, except for the exercise of the supervisory jurisdiction of this Court, the decree of the Circuit Court of Appeals is final; and the jurisdiction of this Court to review the judgment of the Court of Appeals now being complained of is specially granted by Sec. 24, para. (c) of the National Bankruptcy Act, as amended, (11 U. S. C. A., Sec. 47) as follows:

“c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals for the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.”

as well as by Judicial Code, Sec. 240, as amended by the Act of February 3rd, 1925, 28 U. S. C. A., Sec. 347; 43 Stats., 938.

4. Jurisdiction to issue the writ now being sought has been sustained in many cases. We cite only one:

Wright v. Union Central Life Ins. Co., 304 U. S. 502; 82 L. Ed. 1490; 58 Sup. Ct. Rep. 1025.

in which certiorari was granted on February 28th, 1938, (303 U. S. 630; 82 L. Ed. 1090; 59 Sup. Ct. Rep. 644), and the case was heard and judgment thereafter rendered on May 31st, 1938.

III.

Statement of the Case.

A statement of the case has been given under heading “A” in the petition, and in the interest of brevity the statement is not repeated here, but the Court is respectfully referred to that statement.

IV.

Federal Statute Involved.

The Federal Statute, of which the proper construction is involved in this case, and of which, under the construction which has been placed upon it below, the constitutionality is called in question, is, as has been pointed out in our petition, Section 75 (n) of the National Bankruptcy Act, as amended, the pertinent portions of which read as follows:

“Sec. 75 (n) The filing of a petition or answer with the cler- of court * * * praying for relief under section 75 of this Act as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property including * * * the right or the equity of redemption where the period of redemption has not or had not expired * * * at the time of filing the petition.

“In all cases where, at the time of filing the petition, the period of redemption has not or had not expired * * * the period of redemption shall be extended * * * for the period necessary for the purpose of carrying out the provisions of this section. The words ‘Period of redemption’ wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree.”

V.

Specifications of Error.

In our petition for the allowance of a writ of certiorari in this case we assigned various reasons relied upon for the

allowance of the writ, but for convenience of discussion in this brief we are combining these into four specifications of error as follows :

1. The United States Circuit Court of Appeals erred in failing to follow the statutory law and jurisprudence of Louisiana in its interpretation of the contract involved in this litigation, thereby deciding an important question of local law in direct conflict with the applicable local statutes and decisions (Reasons 1, 2, and 3 in the petition).

2. The court erred in holding that Sec. 75 (n) of the National Bankruptcy Act, as amended, as quoted above, was intended to apply to the redemptive rights granted respondent under the contract now before the court (Reason 4 in the petition).

3. If Sec. 75 (n) of the National Bankruptcy Act, as amended, was intended by the Congress to apply to the redemptive rights accorded respondent by the contract now before the court, then the court erred in failing to hold that to such extent said Sec. 75 (n) of the National Bankruptcy Act, as amended, exceeds the bankruptcy powers of Congress, and to that extent is unconstitutional as depriving your petitioner of its property without due process of law in violation of the Constitution of the United States, particularly Amendment V. thereof (Reason 5 in petition).

4. The court erred in holding that respondent's right to *possession* of the property now in litigation, which possession admittedly was held only under a lease-hold tenure, could be extended under the provisions of Section 75 (n) of the National Bankruptcy Act, as amended (Reason 6 in the petition).

VI.

Summary of Argument.

POINT I.

In the opinion and judgment complained of an important question of local law has been decided in a way which is in direct conflict with applicable local decisions.

POINT II.

The National Bankruptcy Act, as amended, and particularly Sec. 75 (n) thereof, was not intended to apply to, or affect the redemptive rights accorded respondent by the contract now in litigation.

POINT III.

If so intended then to that extent said provision deprives your petitioner of its property without due process of law, exceeds the bankruptcy powers of Congress, and is, therefore, in conflict with the mandatory provisions of the United States Constitution, particularly Amendment V. thereof.

POINT IV.

The National Bankruptcy Act, as amended, particularly Sec. 75 (n) thereof, does not purport to authorize a court of bankruptcy to extend or enlarge the term of a lease, or to interfere with lessor's right to retake possession of his property at the expiration of said lease.

These points will be discussed in order in the argument which follows :

VII.

ARGUMENT.

POINT I.

In the opinion and judgment complained of an important question of local law has been decided in a way which is in direct conflict with applicable local decisions.

We take it that it will not be questioned that the Federal courts are bound to follow not only the statutory law but the jurisprudence of a particular State in deciding questions of purely local law.

In the case of *Board of Trade v. Johnson*, 264 U. S. 1-16, 68 L. Ed. 533, 44 Sup. Ct. Rep. 232, this Court expressly held that, although the construction of the Bankruptcy law is a Federal question, nevertheless "where the Bankruptcy Law deals with property rights which are regulated by the state law, the Federal courts in bankruptcy will follow the state courts". And in the recent case of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64-92, 82 L. Ed. 1188, 58 Sup. Ct. Rep. 817, this Court, in overruling *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865, said :

"Except in matters governed by the Federal Constitution or by Acts of Congress, *the law to be applied in any case is the law of the State*. And whether the law of the State shall be declared by its Legislature in a Statute or by its highest court in a decision is not a matter of federal concern. There is no federal common law. *Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', be they commercial law or a part of the law of torts*. And no clause in the Constitution purports to confer such a power upon the federal courts * * * " (Emphasis ours).

That the United States Circuit Court of Appeals for the Fifth Circuit, in the opinion and judgment now complained of, has decided an important question of local law in a way which is in direct conflict with applicable local decisions, seems to us too plain to admit of argument; and this fact alone, without reference to the other errors, which we conceive to have been committed by the District Court, and perpetuated by the Circuit Court of Appeals in reaching its decision, should, and we submit, does, entitle petitioner to a review by this Court of the judgment now complained of.

The most cursory reading of the collateral contract of February 28th, 1938 (R. 14-15), demonstrates that the privilege of repurchase or redemption, whichever it may be termed, as granted to Leon Kirby thereby, was strictly a *privilege*—a privilege which he had an absolute *right* to exercise within the time, but without the slightest *obligation* on his part to do so.

Now the only two types of contract known to or sanctioned by the Louisiana law, under which one contracting party may enjoy the *privilege or option* of purchasing or redeeming real estate, title to which is vested in the other contracting party, without assuming any corresponding *obligation* to so purchase or redeem are:

(a) the option, which, by Art. 2462 of the Revised Civil Code of Louisiana of 1870 (which is a part of the Statutory law of this State) is defined as follows:

“Art. 2462 * * * One may purchase the right, or option to accept or reject, within a stipulated time, an offer or promise to sell, after the purchase of such option, for any consideration therein stipulated, such offer, or promise, can not be withdrawn before the time agreed upon; and should it be accepted within the time stipulated, the contract or agreement to sell, evidenced by such promise and acceptance, may be specifically enforced by either party.”

and

(b) the sale with reservation of the right of redemption, which is dealt with in Articles 2567, *et seq.* of the same Code, as follows :

“Art. 2567 * * * The right of redemption is an agreement or paction, by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it.”

“Art. 2568 * * * The right of redemption can not be reserved for a time exceeding ten years.

If a term, exceeding that, has been stipulated in the agreement, it shall be reduced to the term of ten years.”

“Art. 2569 * * * The time fixed for the redemption must be rigorously adhered to; it cannot be prolonged by the judge.”

“Art. 2570 * * * If the right has not been exercised within the time agreed on by vendor, he can not exercise it afterwards, and the purchaser becomes irrevocably possessed of the thing sold.”

“Art. 2571 * * * The delay runs against any persons, not excepting minors, who can not be relieved against it.”

“Art. 2572 * * * A person, having sold a thing with the power of redemption, may exercise the right against a second purchaser, even in case such right should not have been mentioned in the second sale.”

“Art. 2573 * * * The person, having purchased an estate under a condition of redemption, is entitled to all the rights possessed by the vendor; he may prescribe against the true owner, as well as against those having claims or mortgages on the thing sold.”

“Art. 2574 * * * He may oppose the plea of discussion to the creditors of his vendor.”

“Art. 2575 * * * The fruits are his until the vendor exercises his right of redemption.”

Therefore, under the statutory law of Louisiana, since the contract of February 28th, 1938, entered into between petitioner and respondent simultaneously with the execution by respondent to petitioner of the deed of the same date, by its terms confers upon respondent only a *right* to purchase or redeem the property sold, without imposing a corresponding *obligation* to do so, it follows that that contract can only be held to constitute either an *option to purchase*, or a *reservation of the right of redemption* within the purview of the Articles of the Louisiana Civil Code relating to that type of contract.

In the present case, far from following any of the above quoted statutory provisions in construing the contract now in litigation, and determining the respective rights of the parties thereunder, the United States Circuit Court of Appeals for the Fifth Circuit has attempted to impress upon this contract an anomalous character not provided for by any of the above quoted codal provisions.

In its opinion that court rejects this contract as constituting an option in the following language:

“We think it clear that Kirby’s right was not that of a mere optionee, who had never owned the property before. A pure option to buy might not be extendible under the bankruptcy power because no debt exists.”

It also rejects this contract as constituting a reservation of the right of redemption in the following language:

“Nor is Kirby’s case exactly that described in Louisiana Civil Code, Art. 2567. ‘The right of redemption is an agreement or paction, by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it.’ In such a transaction the time cannot be extended by the judge. Arts. 2569, 2570.”

On the contrary that court has simply placed this contract in the anomalous category of evidencing a right of re-

demption from debts, as witness the concluding sentence of the opinion reading as follows :

“The right of redemption which he had and the period of redemption ending Dec. 31, 1938, relate to redemption from debts and are within the provision quoted from Sect. 75, sub. n; and the extension provided is within the bankruptcy power of Congress. *Wright vs. Union Central Life Ins. Co.*, 304 U. S. 502, 517, 58 S. Ct. 1025, 82 L. Ed. 1490.”

There is, it is true, a type of contract known to and permitted by the Louisiana law, by which a debtor may convey immovable property to his creditor as *security* for his debt. This is known as *antichresis* and is provided for by the following articles of the Civil Code :

“Art. 3133 * * * The pledge is a contract by which one debtor gives something to his creditor as a security for his debt.”

“Art. 3134 * * * There are two kinds of pledge:
The pawn.
The antichresis.”

“Art. 3135 * * * A thing is said to be pawned when a movable thing is given as security; and the antichresis, when the security given consists in immovables.”

“Art. 3176 * * * The antichresis shall be reduced to writing.

The creditor acquires by this contract the right of reaping the fruits or other revenues of the immovables to him given in pledge, on condition of deducting annually their proceeds from the interest, if any be due him, and afterwards from the principal of his debt.”

“Art. 3177 * * * The creditor is bound, unless the contrary be agreed on, to pay the taxes, as well as the annual charges of the property which have been given to him in pledge.

He is likewise bound, under penalty of damages, to provide for the keeping and useful and necessary repairs of the pledged estate, saving himself the right of levying on their fruits and revenues all the expenses respecting such charges."

"Art. 3178 * * * The debtor can not, before the full payment of the debt, claim the enjoyment of the immovables which he has given in pledge.

But the creditor who wishes to free himself from the obligations mentioned in the preceding articles, may always, unless he has renounced this right, compel the debtor to retake the enjoyment of his immovable."

"Art. 3179 * * * The creditor does not become owner of the pledged immovable by failure of payment at the stated time; any clause to the contrary is null, and in this case it is only lawful for him to sue his debtor before the court in order to obtain a sentence against him, and to cause the objects which have been put in his hands in pledge to be seized and sold."

But in such a contract, it will be observed, the debtor is not in any way relieved of his obligation to pay the debt, and the creditor does not become the owner of the real estate in question. He is simply the pledgee, being required to foreclose his pledge in order to acquire title and liquidate the debt.

The contract here involved is, of course, patently and demonstrably not such a contract. The trial court *expressly* rejected any such contention (R. 22-23) and the Circuit Court of Appeals, in its opinion, *impliedly* rejected this contention, by omitting altogether any reference thereto.

Moreover the Louisiana law is clear that this contract does not and cannot be considered to constitute a security transaction or antichresis within the codal provisions above quoted.

In the case of *Henkel v. Mix*, 38 La. Ann. 271 (1886), the proposition was submitted to the Supreme Court of Louisiana that a contract similar to the one now in litigation was intended to operate as a mortgage, or pledge, and that court in holding that the contract constituted a sale, with reservation of right of redemption, said:

“This court has held over and over again that when parties really intend to create a mortgage for the security of an existing or contemplated debt, and adopt the form of a sale with counter-letter, which, taken together exhibit such intention, the sale will be construed as a mortgage and effect be given to it accordingly. The whole subject with numerous decisions thereon was reviewed in *Parmer v. Mangham*, 31 Ann. 348, and very lately we applied the doctrine in *Corzier v. Ragan*, not yet reported (38 Ann. 154).”

“But the plaintiff under cover of those decisions, wishes to announce a very different doctrine, viz.: That when the authentic act is in the form of a sale, and the counter-letter repeats that the intention of the parties is that it shall be what it purports to be, and emphasizes the expression of that intention by a preamble, ‘Whereas B. D. Gullett has this day purchased of A. D. Henkel the tract of land,’ and he promises to reconvey after the lapse of a certain time and on certain conditions, and Henkel expressly and in terms accepts the position of tenant to the vendee that then and in such case the intention of the parties shall be disregarded, and the act shall be declared to be a mortgage. The injunction explicitly rests upon what is alleged to have been the intention of the parties. The counter-letter explicitly declares that intention to have been wholly different from what is now alleged.”

The same claim was made in the case of *Brooks v. Broussard*, 136 La. 380, 67 So. 65 (1915), and the Supreme Court of Louisiana in rejecting the contention that the contract in that case constituted a security, or pignorative contract,

and in holding that it did constitute a sale with a stipulation of the right of redemption, said:

“The purpose of the sale was to provide for the payment of all encumbrances on the property, and to secure to the vendor a delay in nine months, within which to pay the sum agreed upon as the price of redemption, and also to secure to the vendor the free use of the premises during the year 1913. Boiled down, the transaction was a transfer of property to pay the debts of the vendor, with a stipulation of the right of redemption.”

This case is so similar to the present case as to require special comment on its facts:

In that case Homer Broussard, by Notarial Act, sold and delivered to G. H. Brooks a tract of land for the consideration of the purchaser's obligating, and binding himself to pay and cancel the encumbrances then resting on the land, consisting of two mortgages, one to A. C. Lormand and the other to G. H. Broussard, and a judgment and the taxes on the land for the year 1912, aggregating \$5,498.28; just as in the present case Leon Kirby, by Notarial Act, transferred the land now in litigation to the Catahoula Bank for the consideration of that purchaser's obligating itself to discharge the first mortgage due the Federal Land Bank, and the second mortgage due itself, and in addition actually discharging certain inferior judgment encumbrances aggregating \$1,066.19, the whole amounting to \$9,910.50.

In the *Brooks* case, in the collateral agreement, or counter-letter, Brooks bound himself to transfer the same property back to Broussard, “and no other”, for the price of \$6,000.00, specially providing that the contract was to expire if the said purchase was not made before November 1st, 1913, and that Broussard was to reside on the place

during the following year, and cultivate it free of rent; whereas in the present case the collateral contract granted Leon Kirby the option to repurchase the property up to December 31st, 1938, upon payment of the entire amount of \$9,910.50, with 8% interest from January 1st, 1938, together with all costs and expenses thereafter incurred, and paid by the Bank on said property, and also that the property should be leased and rented to Leon Kirby for the calendar year 1938, in consideration of his agreement to pay all taxes accruing against said property that year, to preserve and properly care for said property during the term of the lease, and to deliver full and complete possession thereof to the Bank on December 31st, 1938.

The facts of the *Brooks* case are almost on all fours with the facts in the present case except that the acts in that case were probably more susceptible of an interpretation as a pignorative contract than the acts now before the Court, yet the Court refused to so regard them, and as has been shown above specifically held them to constitute a sale, with reservation of the right of redemption.

The cases in the Louisiana jurisprudence where an instrument in the form of a sale, with a counter-letter, has been held to constitute merely a security, or pignorative transaction are all instances in which the written contracts themselves evidence the pignorative character of the contract, or they are cases in which the recited consideration was wholly inadequate, or where there has been continued possession by the vendor unexplained. For example see the cases of: *Calderwood v. Calderwood*, 23 La. Ann. 658; *Baker v. Smith*, 44 La. Ann. 925, 11 So. 585; *Marbury v. Colbert*, 105 La. 467, 29 So. 871; *Latialais v. Breaux*, 154 La. 1006, 98 So. 620; *Bell v. Leiendecker*, 187 La. 1, 174 So. 89; *Ware v. Morris*, 23 La. Ann. 665; and *Gautreaux v. Harang*, 190 La. 1060, 183 So. 349.

In *Tangelet v. Chopin*, 155 La. 752, 99 So. 587, the court said:

“There are many adjudications by this court holding certain sales with right of redemption to be mere contracts of security, and not intended as bona fide sales translativ of the ownership of property, *but in every one of these cases there appeared continued possession on the part of the vendor, a vile consideration, fraud, or an attempt to evade some law founded on public policy.* But the present case presents no such feature, and our opinion is that the present contract of sale herein sought to be declared simulated is real, and evidences the real intent of the parties.” (Emphasis ours.)

It will thus be seen that although there have been cases in the Louisiana jurisprudence holding instruments in the form of sales to be mere contracts of security, such holding is restricted to three circumstances, namely: (1) Where the acts themselves indicate the intention of the parties to create a mere security contract; (2) Where there has been an inadequate or vile consideration, and (3) Where there is continued possession by the vendor unexplained.

In the present case, of course, the acts in question indicate within themselves the intention of the parties to effect an outright sale, rather than to create a mere security contract; the acts themselves evidence an adequate consideration; and the continued possession of the property by Leon Kirby is amply explained by the lease contract for the calendar year 1938, which was incorporated in the acts themselves.

The Court of Appeals, as pointed out above, apparently recognized that this deed and contract of February 28th, 1938, could not be held to constitute a security or pignorative contract, and that court made no attempt to so hold.

That court also recognized that: "If no debt was involved perhaps bankruptcy power might fail to accomplish an extension contrary to the terms of the contract."

And since the idea of debt is wholly precluded in the relationship between an optionor and an optionee, and since the relationship of debtor and creditor is, under the Louisiana law effectively and conclusively brought to an end with the execution of a sale with reservation of the right of redemption, that court undertook to get around both of these forms of contract by simply holding that the contract now in question evidenced some anomalous kind of right of redemption from debts, wholly unknown to the Louisiana jurisprudence.

That the conclusion reached by the Court of Appeals is predicated upon the idea of the debtor-creditor relationship is further evidenced by the following quotation taken from the opinion now under discussion:

"* * * What impresses us here is that debts and debts alone are involved in the price, and the effect of the whole transaction is to have the bank to assemble those debts which incumbered the farm and to give Kirby until Dec. 31, 1938, to redeem his farm by paying them. His bearing the taxes and keeping up the property meanwhile is only what as owner he ought to do."

In taking this position their Honors below overlooked the fact that with the execution by Kirby to the Bank of the deed of February 28th, 1938, and the contract entered into at the same time, *the debtor-creditor relationship therefore existing between the parties came to an end*. Thereafter under the law and jurisprudence of Louisiana there was no indebtedness whatsoever existing from Leon Kirby in favor of the Catahoula Bank. From that moment the Bank was utterly powerless to urge or enforce any obligation against Leon Kirby and could not even have compelled him to avail

himself of the privilege of repurchase or redemption accorded him by this contract. *He was by those instruments specifically released of any indebtedness, and by those instruments the Bank became the absolute outright owner of the property; and the right, which was secured to Leon Kirby to repurchase the property upon the payment of the amount specified, did not either perpetuate any previously existing indebtedness nor create any new indebtedness on his part.* True it is that the amount of the redemptive price was determined with reference to the amount of the debts which the Bank paid or agreed to pay in purchasing the property, but that fact does not and should not alter or affect the legal relationship existing between the parties, and *this relationship cannot be held to constitute or to be in any way analogous to the debtor-creditor relationship without doing absolute violence to all of the law and jurisprudence which has grown up in Louisiana over a period of many years.*

If Leon Kirby had never been a debtor of the Catahoula Bank and had sold this property outright to the Bank for a cash consideration paid at the time, and had reserved to himself the same right of redemption which is reserved and granted to him by the contract of February 28th, 1938, then there could have been no room to hold that any debtor-creditor relationship existed between them because the only relationship between the parties in that case would have been the relationship of vendor and purchaser.

Yet that is precisely the same situation which, under the law and jurisprudence of Louisiana, now exists between them. And the mere fact that the purchase price was paid by the Catahoula Bank by the payment, assumption, and release of indebtedness due by Kirby cannot and should not alter or in any wise affect the respective rights of the parties.

We are not here attempting to argue whether this contract constitutes a mere option, as we are convinced it

does, or whether it evidences the reservation of the right of redemption under the codal provisions above quoted, as was specially held by the trial court. What we do wish to impress upon this Court, in urging the allowance of the writ which we are now seeking, is the fact that if the acts in this case do not constitute a security, or pignorative contract, which manifestly they do not, *then under the Louisiana law and jurisprudence they must constitute either an option to repurchase or a sale with reservation of the right of redemption, since no other form of redemptive contract is known to the Louisiana law.* And when the Court of Appeal expressly refused to classify Leon Kirby's right as that of an optionee, recognizing that a pure option might not be extended under the bankruptcy power because no debt existed; and when it also refused to classify Kirby's rights as falling within the definition of the right of redemption under Article 2567, recognizing that in such a transaction the time cannot be extended by the Judge; when the Court of Appeal refused to classify these acts within one of the other of those two categories, attempting to place them in some anomalous category as evidencing a right of redemption from debts, then it has wholly and completely refused to follow the Louisiana statutory law and jurisprudence and has undertaken to decide a question of purely local law in a way which is in direct conflict with all of the law and jurisprudence of Louisiana applicable to such cases.

POINT II.

The National Bankruptcy Act, as amended, and particularly Sec. 75 (n) thereof, was not intended to apply to, or affect the redemptive rights accorded respondent by the contract now in litigation.

We shall not attempt in this brief to convince your Honors that the contract of February 28th, 1938 constitutes a pure option to purchase, as we sincerely believe it does, rather

than a reservation of the right of redemption, as was held by the trial court. *For all practical purposes it makes very little difference in which category this contract is placed, because in neither event would the provisions of Section 75 (n) relating to an extension of the period of redemption be applicable.*

This was specially recognized by the Court of Appeals in its opinion for that court said (R. 44) :

“We think it clear that Kirby’s right was not that of a mere optionee, who had never owned the property before. *A pure option to buy might not be extendible under the Bankruptcy power because no debt exists.*” (Emphasis ours).

and further (R. 44-45) :

“Nor is Kirby’s case exactly that described in Louisiana Civil Code, Art. 2567. ‘The right of redemption is an agreement or paction by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it.’ *In such a transaction the time cannot be extended by the judge. Arts. 2569, 2570.*” (Emphasis ours).

and that court undertook to argue around the difficulty thus presented by holding, as we have pointed out in the preceding division of this argument, that this contract preserved to the respondent, Leon Kirby, some kind of anomalous right of redemption from debts—a right which we have shown is not accorded by or known to the Louisiana law.

It requires, we think, no argument to demonstrate that if this is a pure option, its term cannot be extended under the Bankruptcy power, and that the provisions of Section 75 (n) of the National Bankruptcy Act, do not purport to apply to a pure option. It is likewise our contention that, even assuming this contract to constitute a reservation of the right of redemption within the purview of the codal

provisions relating to that type of contract, the language of this section does not, and does not even purport to, apply to the right of redemption provided for by the Louisiana law—a contention which was impliedly vindicated by the Circuit Court of Appeals in the language quoted above.

It is our firm conviction, and we so submit to your Honors, that the equity of redemption contemplated by the quoted provision of this section has reference to, and only to, the equity of redemption which is accorded by the law of most States of the United States to a mortgage debtor to redeem his property sold at a mortgage foreclosure sale for a given statutory period of redemption following the actual foreclosure sale.

This, we think, is made clear by the Senate Committee on the Judiciary which, in its report (S. R. 985) 74th Congress, First Session, page 1, gave an explanation of the amendment to Section 75 (n) reading as follows:

“ ‘The amended subsection (n) in fact construes, interprets, and clarifies both subsections (n) and (o) of Section 75. By reading subsections (n) and (o) as now enacted, it becomes clear that *it was the intention of Congress*, when it passed section 75, that the debtor farmer and all of his property should come under the jurisdiction of the court of bankruptcy, and *that the benefits of the act should extend to the farmer prior to confirmation of sale, and during the period of redemption*; and that no proceedings after the filing of the petition should be instituted, or, if instituted prior to the filing of the petition, should not be maintained in any court, or otherwise. Yet there have been a multiplicity of different holdings and conclusions reached by different courts on this subject. The amended subsection (n) clarifies, construes, and interprets the intent of Congress, so as to bring about uniform decisions and rulings by the courts in the future’ ” (Emphasis ours).

It is our view that the language used in this committee report indicates the intention on the part of Congress that

the language of Paragraph (n) of Section 75 with which we are now concerned, was intended to apply only to the statutory right or equity of redemption where the relationship of debtor and creditor still, to some extent exists and that it was not intended that the language of Paragraph (n) should extend to and apply to a voluntary contract, such as is now before the court, wherein the debtor-creditor relationship has been completely terminated and has been superseded by a contractual relationship from which mutual rights and obligations have arisen wholly unconnected with the debtor-creditor relationship previously existing.

In the case of *Wright v. Union Central Life Insurance Co.*, 304 U. S. 502-518, 82 L. Ed. 1490, 58 Sup. Ct. Rep. 1025, decided by this Court in May, 1938, in which the constitutionality of this provision of the statute was upheld, the equity of redemption then under consideration was a statutory right of redemption existing by statute under the laws of the State of Indiana for a period of one year following the foreclosure. And we submit in all sincerity that the language of this decision indicates beyond any doubt that in affirming the constitutionality of this provision of the statute your Honors had in mind this conception of the meaning of the term "equity of redemption" as used in the statute.

As a matter of fact the statute itself, we think, evidences an indication of the meaning intended by Congress to be attached to the term "equity of redemption" by providing the following explanatory definition:

"* * * The words 'period of redemption', wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree * * *."

This language, we think, shows conclusively that Congress itself intended by this provision of the statute to per-

mit a Court of Bankruptcy, whose jurisdiction had been invoked by a distressed debtor, under the provisions of this section to secure to the distressed debtor an extension of the redemptive rights accorded him by the *State law* so as to permit the orderly rehabilitation of the debtor's affairs in bankruptcy. But there is nothing in the language of this section which can be construed as an intention on the part of the Congress to vest in a Court of Bankruptcy the power to alter and extend the provisions of a *private contract*, *voluntarily* entered into between the debtor and his creditor, *so as to substitute for their private agreement another and entirely different contract*.

Returning to the case of *Wright v. Union Central Life Insurance Co.*, cited *supra*, your Honors will note that the basis upon which the constitutionality of this provision was upheld, as constituting a reasonable exercise by the Congress of the jurisdiction over bankruptcies accorded to it by the Federal Constitution, was the fact that *under the law of Indiana*—where that case arose—the debtor was accorded *an absolute right to redeem the property within one year following the foreclosure* and that, while this equity of redemption was in effect and prior to the expiration of the period of this redemptive period, the debtor himself was entitled under the law *to the possession of the property which had previously been sold at foreclosure sale*. In other words, under the law of Indiana the *purchaser* of property at a foreclosure was not entitled to *possession* of the property until the lapse of one year following the date of the foreclosure, during which period the law secured to the debtor an equity or right of redemption; and this Court held that there was a sufficient analogy between a foreclosing purchaser who was entitled to the redemption money or possession at the expiration of this one year period, and a mortgage creditor who had not exercised his foreclosure rights but who still remained in the relationship of a creditor with

mortgage rights, to justify Congress in bringing the foreclosing purchaser within the purview of the Bankruptcy Act, which admittedly is applicable to the mortgage creditor. This holding and the concept of the term "equity of redemption", which this holding necessarily contemplates, is evidenced, as we see it, beyond all question by the language of the court appearing at *page 1500* of the *Law Edition Reporter*, as follows:

"* * * But respondent urges that under the Bankruptcy Clause Congress is confined to legislation for the adjustment of the debtor-creditor relationship, and insists that the purchaser at an Indiana judicial sale is not a creditor but a grantee with rights acquired by the purchase, separate and distinct from the rights and obligations arising from the creation of the debt. While there may be no relation of debtor and creditor between the bankrupt and the purchaser of his property at judicial sale, *we think the purchaser at a judicial sale does enter into the radius of the bankruptcy power over debts.* His purchase is in the liquidation of the indebtedness. The debtor has a right of redemption of which the purchaser is advised, and until that right of redemption expires the rights of the purchaser are subject to the power of the Congress over the relationship of debtor and creditor and its power to legislate for the rehabilitation of the debtor. The person whose land has been sold at foreclosure sale and now holds a right of redemption is, for all practical purposes, in the same debt situation as an ordinary mortgagor in default; both are faced with the same ultimate prospect, either of paying a certain sum of money, *or of being completely divested of their land.* We think the provision for the extension of the period of redemption comes clearly within the power of the Congress under the bankruptcy clause * * *" (Emphasis ours).

And again at *page 1501* as follows:

"* * * The rights of the purchaser are preserved, the possibility of enjoyment is merely delayed. The

rights of a purchaser, *who under the state law is entitled to the redemption money or possession within a year*, are not substantially different from those of a mortgagee entitled, on the maturity of the obligation, to payment or sale of the property" (Emphasis ours).

Your Honors will, of course, notice at once the very marked difference between the statutory right or equity of redemption which the court undoubtedly had in mind in deciding the *Wright* case and the right of redemption contemplated by the provisions of the Louisiana Revised Civil Code.

We have heretofore shown that, by the express provisions of our Code, the purchaser of property under reservation of the right of redemption permitted by the Code *receives the property in full ownership and is entitled to exercise immediate possession and every other attribute of actual ownership* subject only to the right of the seller to redeem the property strictly within the term specified in his reservation; and that any debtor-creditor relationship theretofore existing has become effectively and completely superseded by the relationship of vendor-purchaser created by the act itself, as sanctioned by the Louisiana law and jurisprudence.

To revert to the language used in the *Wright* case quoted above, the vendor in Louisiana who, under the provisions of our Civil Code, has sold his land with reservation of the right of redemption is *not* in the position of being "faced with the same ultimate prospect, *either of paying a certain sum of money, or of being completely divested of his land.*" Such a vendor, under the Louisiana law, *has by virtue of the sale itself, been completely discharged of his indebtedness and completely divested of his land*, and all the enjoyment thereof, and he simply enjoys the privilege of paying a certain sum of money, strictly within the terms of his contract, *in order to regain his land.*

Moreover the rights of the purchaser, against whom the right of redemption is reserved, are not that he "*under the State law is entitled to the redemption money or possession within a year*" or within any other specified term. The purchaser's rights, under the Louisiana law, are fixed by the deed itself, and *he is entitled to the immediate possession and enjoyment of the property which he has bought*. He is not entitled under any circumstances to the redemption money, and is only faced with the obligation of returning the property, if the redemptive price should be paid, strictly within the terms of the redemption reservation.

The rights of such a purchaser, who as we have already pointed out, under our jurisdiction enjoys all the fruits and effects of absolute, outright and unequivocal ownership and who is under no necessity to perform any positive act whatsoever to perfect his title after the specified period of redemption has expired—his rights, we say, are very greatly different from the rights of a purchaser at a foreclosure sale whose right to possession of the property and to the full enjoyment of his title is held in abeyance during the statutory period of redemption in a state which by law secures to the foreclosed debtor a right or equity of redemption for a specified statutory period of time after the sale. Such a mortgage-purchaser in the states which accord to the debtor a right or equity of redemption is uniformly required to take some further positive action in order to perfect his title and entitle him to possession after the period of redemption has expired and it may well be, as pointed out by this Court in the *Wright* case, that there is no great difference between his rights before the foreclosure and his rights after the foreclosure. But that is not the situation here.

Granting, as was pointed out by the Court of Appeals, that debts and debts alone were involved in the price of this

sale, it is equally true that those debts have been completely discharged; and under this contract, voluntarily entered into between these parties, Leon Kirby, could successfully oppose this agreement to any claim on the part of the Bank for the collection of any of the monies previously due it. Leon Kirby could likewise successfully resist any efforts on the part of the Bank to *force* him to exercise the option or right of redemption, whichever it may be termed, granted to him by this contract, since the right granted to him was merely a *right* which he might have exercised or not as he saw fit, free of any compulsion on the part of the Bank.

In the case now at bar we have a situation—not where the state law secures to the foreclosed debtor his right or equity of redemption and a statutory period for its exercise during which time the debtor is entitled to retain possession of the property and the purchaser's rights are merely inchoate—but where under the Louisiana law and jurisprudence the Catahoula Bank has obtained an outright, indefeasible title to the property in litigation *carrying with it all of the rights and attributes of actual, outright, unhampered ownership, including the right of possession and enjoyment* and the parties have by private contract, voluntarily entered into, agreed that for a specified period of time the seller might repurchase the property upon paying a certain specified purchase price in cash, which contract even if it be construed as a deed with right of redemption within our codal provisions must under the law and jurisprudence of this state be strictly construed and the term of which the courts under our law are powerless to extend.

We submit that it was clearly not the intention of the Congress to assume to a court of bankruptcy jurisdiction over a private contract of this kind or to accord to a court of bankruptcy any power to extend or alter the provisions

of a private voluntary contract of this nature. And we respectfully submit that in this instance it must now be held that the provisions of Section 75 (n) of the Bankruptcy Act have no application to the contract now before the Court.

POINT III.

If intended to apply to a contract of this nature, then to that extent Section 75 (n) of the National Bankruptcy Act as amended exceeds the bankruptcy powers of Congress, deprives petitioner of its property without due process of law, and is, therefore, in conflict with the prohibitory provisions of the United States Constitution, particularly Amendment V thereof.

In contending that this section, if held applicable to a contract of this nature, exceeds the Bankruptcy powers of the United States Congress, and contravenes the provisions of the Federal Constitution, we are not unmindful of the fact that this Court has on various occasions held that the prohibition in the Federal Constitution against impairing the obligation of a contract is imposed by that Constitution upon the legislatures of the several States and not upon the Congress; and further that this Court has also held that where, in the exercise of one of the direct powers granted to it by the Constitution, the Congress has enacted legislation which indirectly impairs the obligation of a contract, such legislation is not thereby necessarily rendered unconstitutional.

However, this Court has recognized that Congress has no inherent power to adopt legislation, disconnected with any of the special powers granted to it by the Constitution, which directly and necessarily impairs the obligation of a contract, and that legislation which impairs the obligation of a contract will be upheld as permissible under the Constitution only where that legislation constitutes a fair and

reasonable exercise of the special power which it is intended to further and the impairment of the obligation of the contract is merely indirect and incidental to the larger purpose for which the legislation was enacted.

In delineating what is included within the meaning of the term "obligation of a contract" your Honors in the case of *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398-483, 78 L. Ed. 413, 54 S. Ct. Rep. 231, said at page 424 of the Law Edition Reporter:

"The obligation of a contract is 'the law which binds the parties to perform their agreement.' *Sturges v. Crowninshield*, 4 Wheat. 122, 197, 4 La. ed. 529, Story, op. cit., Sec. 1378. This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. * * * Nothing can be more material to the obligation than the means of enforcement. * * * The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion.' *Von Hoffman v. Quincy*, 4 Wall. 535, 550, 552, 18 L. Ed. 403, 408, 409. See also *Walker v. Whitehead*, 16 Wall. 314, 317, 21 L. ed. 357, 358 * * *."

and in deciding what constituted an impairment of the obligation in the same case—page 425—said:

"The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them (*Sturges v. Crowninshield*, *supra*, 4 Wheat. pp. 197, 198, 4 L. ed. 549), and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights * * *."

Without further citations and in the light of the language used by the Court as quoted above and the citations therein

referred to, we take it there can be no room for argument that this section of the Bankruptcy Act, as applied to the contract now under consideration by the Court, must be held to impair its obligations since, if this section is applied to this contract, the result would be in effect to substitute an entirely different contract between the parties from that which they had themselves originally and voluntarily entered into.

In denying to the Congress the right to adopt legislation directly impairing the obligation contracts and not in furtherance of any of the special powers accorded it under the Constitution, this Court has recognized, as pointed out above, that the prohibition in the Constitution against such legislation is directed at the State Legislatures rather than the Congress, but places its denial to Congress of this power upon the basis that the arbitrary impairment of the obligation of private contracts constitutes the taking of property without due process of law. For instance in the early case of *Hepburn v. Griswold*, 8 Wall. 603-639, 19 L. Ed. 513, this Court in holding that the Congress is without right to adopt legislation, *not made in pursuance of an express power*, which impairs the obligation of contracts, said at page 526 of the Law Edition Reporter:

“The same principle found more condensed expression in that most valuable provision of the Constitution of the United States, ever recognized as an efficient safeguard against injustice, that ‘no State shall pass any law impairing the obligation of contracts.’

“It is true that this prohibition is not applied in terms to the Government of the United States. Congress has express power to enact bankrupt laws, and we do not say that a law made in the execution of any other express power, which, incidentally only, impairs the obligation of a contract, can be held to be unconstitutional for that reason.

“But we think it clear that those who framed and those who adopted the Constitution intended that the

spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.

“Another provision, found in the 5th amendment, must be considered in this connection. We refer to that which ordains that private property shall not be taken for public use without compensation. This provision is kindred in spirit to that which forbids legislation impairing the obligation of contracts; but, unlike that, it is addressed directly and solely to the National Government. It does not, in terms, prohibit legislation which appropriates the private property of one class of citizens to use of another class; but if such property cannot be taken for the benefit of all, without compensation it is difficult to understand how it can be so taken for the benefit of a party without violating the spirit of the prohibition.”

And in the case of *Continental Illinois National Bank & Trust Co. v. C. R. I. & P. R. R. Co.*, 294 U. S. 638-685, 79 L. Ed. 1110, 55 S. Ct. Rep. 595, at page 1130 of the Law Edition Reporter, said:

“The Constitution, as it many times has been pointed out, does not in terms prohibit Congress from impairing the obligation of contracts as it does the states. But as far back as *Calder v. Bull*, 3 Dall. 386, 388, 1 L. ed. 648, 649, it was said that among other acts which Congress could not pass without exceeding its authority was ‘a law that destroys or impairs the lawful private contracts of citizens.’ The broad reach of that statement has been restricted (*Legal Tender Cases*, 12 Wall. 457, 549, 550, 20 L. Ed. 287, 311, 312); but the principle which it includes has never been repudiated, although the extent to which it may be carried has not been

definitely fixed. Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts."

It is, therefore, clear that, unless this Section—75 (n)—of the Bankruptcy Act *as applied to a contract of the kind now under examination* constitutes a clear exercise of the express power over bankruptcies accorded to the Congress by the Constitution, this legislation *as applied to this contract* must be held unconstitutional as impairing the obligation of contracts and to that extent depriving the Catahoula Bank of its property without due process of law.

In the leading case of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, Chief Justice Marshall has said:

"Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

thus pointing out that, although Congress in the exercise of an express power may enact legislation which incidentally and indirectly impairs the obligation of contracts, nevertheless *in order for such legislation to be constitutional it must be clearly within the scope of the express power thus granted to it and the means provided by the legislation must be appropriate and plainly adapted to that end.*

This doctrine was recognized by the Circuit Court of Appeals for the 7th Circuit in the case of *Lafayette Life Insurance Co. v. Lowman*, 79 F. (2d) 887, where that court in discussing the particular section and subdivision of the

statute of the Bankruptcy Act which is involved in this case, said at page 891:

“* * * Therefore, if the Federal statute here in question cannot be upheld under the bankruptcy power, it is invalid.

“We think there is nothing in the constitutional clause conferring upon Congress the control over bankruptcy which authorizes it to change property rights already created by the states. Under the proper exercise of that power, federal courts may be authorized to assume jurisdiction over and to administer property of bankrupts, but they must administer that property as they find it, and they have no power to create new rights in it for the benefit of either debtor or creditor * * *.”

In that case the 7th Circuit Court of Appeals had held this legislation unconstitutional even as applied to a statutory right or equity of redemption and the same court affirmed its ruling in the subsequent case of *Wright v. Union Central Life Insurance Co.*, 91 F. (2d) 894, saying at page 896:

“* * * we did not question the right of the Bankruptcy Court to administer upon that right of redemption, but we thought that the Bankruptcy Court had no right, and that Congress had no power to bestow upon it such right, to enlarge the debtor's estate, which had been limited by the foreclosure and sale in compliance with the laws of Indiana. Certiorari was not sought in that case.”

It is true that in this last cited case certiorari was granted by your Honors and the holding subsequently reversed by this Court and the extension of the period of redemption provided for by this section of the statute was held to be within the constitutional power of Congress under its bankruptcy powers. However that case, as heretofore pointed out, dealt with a statutory right or equity of redemption under which, as a reading of the case will demonstrate, the

debtor was accorded by statute substantial rights in the property far greater than and different from the right of redemption which, under the Louisiana Law, it is possible for a vendor to reserve in disposing of his property to a vendee. And we are convinced and so submit that the holding in the *Wright* case is not authority for the constitutional question which is now presented to the court.

For while, as pointed out in the case of *Wright v. Union Central Life Insurance Co.*, cited *supra*, it may be that the extension of a statutory period of redemption is appropriate and plainly adapted to the relief of a distressed debtor by the Bankruptcy Court, *it is equally obvious that the entire abrogation of a private contract, voluntarily entered into between two individuals under no disability and fully able to act and contract for themselves, and the substitution for such a contract of an entirely different agreement in no wise within the contemplation of the parties, certainly does not constitute a means which is appropriate or plainly adapted to the relief of distressed or insolvent debtors and thus within the bankruptcy power of Congress.*

We concede that the Congress has the power to legislate on the subject of bankruptcy but this power and the power to discharge a bankrupt from his debts and from the obligations of his onerous contracts does not mean that every contract which an individual may make would come within the purview of the Bankruptcy Act nor does it mean that it is within the power of Congress to afford to a bankrupt relief from every contract which he may make.

For instance, it is entirely legal for an individual to bind and obligate himself to refrain from entering a particular business within reasonable limits as to time and territory and the violation of such a contract on his part, where it has been supported by a fair and reasonable consideration, can

be restrained by injunction. Such an individual might be adjudicated a bankrupt and he might be discharged from the payment of his debts but we do not think it will be seriously contended that his adjudication and discharge in bankruptcy would relieve him from his obligation to live up to and perform a contract such as is here supposed.

As stated, it is not every contract from which a bankrupt can secure relief in Bankruptcy, but only those in which the debtor-creditor relationship exists or may be fairly implied. While here, as we have shown, upon the execution of the deed of February 28th, 1938 from Leon Kirby to the Catahoula Bank, the status of debt passed completely out of the picture. Upon the execution of that contract, under the Louisiana law, Leon Kirby no longer owed to the Bank any debt whatsoever, and by the collateral contract of February 28th, 1938, he was not accorded any right to redeem the property from *debts*, but was accorded either an option to *buy* the property for a stipulated purchase price, or a right to redeem the property from *sale* upon repayment of the price, depending upon whether the contract is considered as an option, or as a reservation of the right of redemption. In either event Kirby owed no debt, and could not by the Bank be forced to pay any sum of money whatsoever.

We again submit that it is wholly beyond and above the power of Congress, in the exercise of its Bankruptcy powers, to abrogate a voluntary contract of this nature, and to substitute in its place an entirely different contract which was not within the contemplation of the parties at the time it was entered into.

POINT IV.

The National Bankruptcy Act, as amended, particularly Section 75 (n) thereof, does not purport to authorize a court of bankruptcy to extend or enlarge the term of a lease, or to interfere with lessor's right to retake possession of his property at the expiration of said lease.

Your Honors will observe that under this provision the only thing which the Bankruptcy Court is authorized to extend is the period of redemption for the period necessary for the purpose of carrying out the provisions of this section. This section does not in a manner purport to authorize the enlargement or extension of any of the other terms of the redemptive agreement, and is simply intended to permit the debtor an extended period to redeem his property, during which time whatever rights in the property he may then have are maintained in *statu quo*.

This section does not purport to authorize an extension of the term, or interfere in any way with a lease agreement.

Now in the present case, if the contract now in question be considered as a pure option, as we believe and submit it should be, the bank as the owner of the property is undoubtedly entitled to the full and undisturbed possession of the property which it owned; and if the contract be considered as a reservation of the right of redemption, the bank, as the vendee in a sale under such a stipulation, is likewise entitled to the immediate and unqualified possession of the property sold. This is especially provided for by *Article 2573 of the Revised Civil Code*, which we have quoted above, and which we here repeat as follows:

“Art. 2573 * * * The person, having purchased an estate under a condition of redemption, is entitled to all the rights possessed by the vendor; he may prescribe against the true owner, as well as against those having claims or mortgages on the thing sold.”

The Court of Appeals recognized that Leon Kirby held possession of this property only by virtue of the lease agreement which was incorporated in the contract of February 28th, 1938, and in its statement of the facts, said (R. 44) :

“At the same time and before the same witnesses Kirby and the Bank executed a contract which referred to the act of sale and stated its consideration to be the assumption of all mortgages and incumbrances affecting the property * * * and an additional consideration moving to the sale, to-wit: that the Bank agrees to lease and rent the land to Kirby for the year 1938, he to pay the taxes for the year and preserve and care for the property and to deliver possession to the Bank Dec. 31, 1938 * * *.”

Therefore in this case the only title under which Leon Kirby held and exercised *possession* of the property now in litigation was the lease-hold title granted him by the terms of the contract of February 28th, 1938. He otherwise enjoyed no right of *possession* under his contract even though it be considered as a reservation of the right of redemption, since continued possession of the land was a right which under the law is specially denied him in such case.

Conceding therefore, without admitting, that Section 75 (n) is constitutionally applicable to a contract of this nature all that the Bankruptcy Court is empowered to do by this Section is simply to extend the period of redemption as stipulated therein, and otherwise to enforce the contract according to the provisions of the Louisiana law. Certainly there is no language in this Section which can be invoked to justify, or which even purports to authorize, *the alteration or enlargement of any other provisions of this contract or otherwise to interfere with the rights of the parties thereto. This means that since under the Louisiana law the vendee, Catahoula Bank, is entitled to enjoy the undisturbed possession of the property during the period*

of redemption, the Bankruptcy Court, under this provision, has no right to interfere with such possession and can simply grant the vendor a longer term in which to assert his redemptive rights.

If this lease for the calendar year 1938 had not been incorporated in the contract between Leon Kirby and the Catahoula Bank, then the Bank would have been entitled to take and would have taken immediate possession of the property conveyed by the antecedent sale to the Bank. As a matter of law the Bank in this case did take possession of the property which it had purchased, since, in contemplation of law, the possession of the lessee is the possession of the lessor. And without the benefit of this lease contract the seller, Leon Kirby, would have had no right whatsoever to the possession or other enjoyment of the property sold.

That lease expired by its terms on December 31, 1938, and there is no single word in Paragraph (n) of Section 75 which purports to allow any extension of a lease which a petitioning debtor might be enjoying at the time of the filing of his application for relief under this Section.

If, in the present case, the Bank at the time of its purchase, and its execution of the collateral contract on February 28th, 1938, had exercised its right to take, and had taken possession of the property, and had not entered into the lease agreement with Leon Kirby, under which it leased him the property for the calendar year 1938, we cannot bring ourselves to believe that any court would have held that in the present litigation Leon Kirby would have been entitled, under the terms of Section 75 (n) of the National Bankruptcy Act, to oust the Bank's possession and retake possession of the property; and since the only title under which Leon Kirby held possession of the property is the lease agreement incorporated in this contract of February 28th, 1938 and since this lease agreement expired by its own terms on December 31, 1938, and since Section 75 (n) does

not in any way purport to authorize the extension of the terms of any lease agreement, we cannot conceive how, or under what authority the Court can continue to deprive the Bank of its right to retake *possession* of the property even though it might hold that the *period of redemption* can be extended under this Section.

And since Leon Kirby's possession of this property, under lease from and as tenant of the Catahoula Bank, was in fact the possession of the Bank itself as lessor, and since there is no single word in Paragraph (n) of Section 75 which purports to allow any extension of the term of a lease which a petitioning debtor might be enjoying at the time of the filing of his application for relief under that Section, *a Court of Bankruptcy has absolutely no power or authority to maintain Leon Kirby's possession of this property under the terms of his lease for a longer period than is specified in the lease itself and therefore has no right, power, or authority to interfere with the Bank's possession of this property which it was enjoying all the time through Leon Kirby as its tenant.* The possession which Leon Kirby had had of this property was not his own possession but the possession of the Catahoula Bank, his lessor, and the Bankruptcy Court has no authority under Section 75 (n) or any other provisions of the Bankruptcy Act to alter, diminish, or destroy the lessor's right to retake possession of his property at the expiration of his tenant's lease.

On December 31, 1938, the date of the expiration of this lease, Leon Kirby became and has since remained a mere trespasser upon this property and as such he is certainly not entitled to hold *possession* thereof as against the Bank, the party who under the law is legally and equitably entitled to *possession*, even though under Section 75 (n) of the Bankruptcy Act the period for the exercise of his *redemptive rights* may be constitutionally extended.

VIII.

Conclusion.

In conclusion, we earnestly submit:

1st. That the Circuit Court of Appeals, in the opinion and judgment now complained of, decided an important question of local law in a way which is in direct conflict with applicable local decisions;

2nd. That the Circuit Court of Appeals has decided (as we think, erroneously) important Federal questions which have not been, but should be, decided by this Court; and

3rd. That the conclusions reached by the Circuit Court of Appeals are clearly erroneous in the respects pointed out in the foregoing argument.

Accordingly, we further submit that the writ of certiorari as heretofore and herein applied for should be granted, and the case ordered up for review by this Court; and that in due course the judgment and decree of the Court of Appeals should be set aside, and judgment entered reversing said judgment, as well as the judgment of the trial court, and dismissing respondent's application for any extension of the term of the contract now in question, with recognition of petitioner's ownership and right to possession of the property in question, free from any interference by the Bankruptcy Court.

Respectfully submitted,

WOOD H. THOMPSON,
THOS. W. LEIGH,
Counsel for Petitioner.

OCT 21 1940

CHARLES ELMORE DROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 461

CATAHOULA BANK,

Petitioner,

versus

LEON KIRBY, Debtor.

BRIEF OF RESPONDENT, LEON KIRBY, DEBTOR.

FRANK J. LOONEY,

Attorney for Respondent.

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STATEMENT OF THE CASE.

We cannot accept petitioner's statement of the case, nor the summary statement of the matters involved, contained in the petition for the writ. Our principal reasons for our refusal to accept these statements are, that the facts are not stated in their chronological order, and that conclusions rather than facts have been emphasized. For illustration, the statement begins with the execution of a deed from the debtor to petitioner of date, February 28th, 1938. This was not the beginning of the series of events that led to this litigation. In fact, it was the last trans-

action between the parties. The Catahoula Bank had long prior to this date been a creditor of Leon Kirby. The bank held a mortgage on Kirby's home, which was also under mortgage to the Federal Land Bank.

At the time of the execution of the deed from Kirby to the bank, the bank assembled all Kirby's debts, took the deed, and at the same time, before the same Notary Public, and in the presence of the same attesting witnesses, entered into a contract with Kirby, under which he would have the right to redeem his farm at any time before December 31st, 1938. This contract provided:

"It being the intended purpose of this agreement to permit the said Kirby to re-purchase this property at any time on or before December 31st, 1938, upon him, the said Kirby, re-imbursing to the Bank all money invested in said property by said Bank together with interest as aforesaid thereon."

(Page 16 of Record).

For a statement of the case in conformity with the rules of this Court, we quote from the opinion of the Circuit Court of Appeals (page 42 of the printed record), as follows:

"Leon Kirby on December 20, 1938, filed a petition for relief as a farmer-debtor under Section 75 of the Bankruptcy Act. On December 23, 1938, he applied for extension of the period for redeeming 480 acres of land for the time necessary for the carrying out of the purposes of Section 75, and the whole matter was referred to the Supervising Conciliation Commissioner. Catahoula Bank claimed title to the land, asserting that Kirby had only a lease with an option to buy which expired December 31, (fol.

44) 1938, so there was nothing for the bankruptcy to take hold of; and to alter the contract would take the Bank's property without due process of law. The debtor contended that although he had conveyed title to the Bank he had reserved a lease for 1938, and the right to redeem the land during that term by paying stated debts due to and taken up by the Bank, and that Section 75 could be constitutionally applied to his relief to carry out a plan of rehabilitation submitted by him which looked to the full payment of the Bank over a period of years. The Commissioner in a careful opinion held with the debtor and the district judge affirmed and decreed to Kirby an extension of time, enjoining the Bank from alienating the property pending the proceedings, or from interfering with the possession of Kirby till the further order of the Court. The Bank appeals."

We also quote from the opinion of the Conciliation Commissioner (page 18 of the printed record), as follows, to-wit:

"Contentions of the Petitioning Debtor.

"The debtor contends that the deed and contemporaneous agreement dated February 28th, 1938, constitute a pignorative contract and consequently that the relationship of debtor and creditor continues to exist between him and Catahoula Bank. Alternatively that if the two documents referred to are not an act of hypothecation but a sale, *vente a remere*, that the debtor has a right to redeem the 480 acres under Section 75 of the Bankruptcy Act, particularly Subsection (n) as follows:"

"Contentions of Catahoula Bank.

"Catahoula Bank contends, first, that the contracts under consideration do not fall within the classification of a deed with the right of redemption under

the Revised Civil Code of Louisiana, but constitute an opinion to the debtor to purchase and consequently the matter is without the jurisdiction of the Court under Section 75. The Bank further contends that even if it should be held that the documents constitute a deed with right of redemption that the law and jurisprudence of Louisiana govern and regulate the rights of the parties and that the case does not fall within the intention of Congress in its language used in Section 75 (n) of the Bankruptcy Act relating to equity of redemption. Furthermore, the Bank contends that if it should be held that Congress intended to apply the language of Section 75 (n) to a contract of this kind, then that section to that extent is an arbitrary and unreasonable exercise of the power of Congress over bankruptcies, and, since it impairs the obligations of contracts, it violates the provisions of the Fifth Amendment to the Federal Constitution preventing the taking of property without due process of law."

The report of the Conciliation Commissioner on the law and the facts was adopted *in toto* by the trial judge, and his judgment was affirmed on appeal.

ARGUMENT.

The petition assigns seven specifications of error, and five points are set up under the summary of argument. In reality, there is only one point in the case, and that is, does the debtor, Leon Kirby, have the right under facts in the case, none of which are disputed, and under the statute, to redeem his farm?

The contentions of both parties are set up in our statement of the case, quoted from the opinion of the Com-

missioner. These contentions are disposed of by the opinion of the Commissioner (pages 1 to 28 of the printed record), and by the opinion of the Court of Appeals (pages 42 to 45 of the printed record).

It is immaterial for the correct decision of the case, whether the deed and contemporaneous agreement constitute a contract of security or a sale with the right of redemption. In either case, the debtor is entitled to the relief prayed for, and granted by both the District Court and the Court of Appeals.

It is the universal rule of all Courts to give a contract the effect intended by the parties, if that intention can be ascertained from the contract. The intention of the parties could not have been more definitely stated than it was stated in the contract, and found on page 16 of the record:

"It being the intended purpose of this agreement to permit the said Kirby to re-purchase this property at any time on or before December 31st, 1938, upon him, the said Kirby, re-imbursing to the Bank all money invested in said property by said Bank together with interest as aforesaid thereon."

A citation of authorities at this time can hardly be necessary, as this is an ancient and honored doctrine. As far back as the case of *Holmes v. Grant*, 8 Paige 243, it was recognized and enforced by this Court, and has been uniformly followed since that time.

In the case of *Latiolais v. Breaux*, 154 La. 1008, 98 So. 620, the Supreme Court of the State of Louisiana foreclosed all controversy, when it said:

"The leading case on the subject is *Marbury vs. Colbert*, 105 La. 467, 29 South. 871. That case lays down the rule that—

'Redeemable sales of immovable property, unaccompanied by delivery of the thing sold, will be considered, as between the parties, in the absence of evidence to the contrary, as mere contracts of security.'

In this case we have a redeemable sale, unaccompanied by delivery of the thing sold, with a contract stipulating:

"It being the intended purpose of this agreement to permit the said Kirby to re-purchase this property at any time on or before December 31st, 1938, upon him, the said Kirby, re-imbursing to the Bank all money invested in said property by said Bank together with interest as aforesaid thereon."

This doctrine still prevails in Louisiana, as appears from the recent case of *Baker v. Patton*, 191 La. 784, 186 So. 338. In this case the court held that the contract in question was a sale with the right of redemption, for the reason, *that the vendor did not remain in possession of the land sold.*

If under any theory of the law, the agreement between the parties in this case was not a contract of security, it certainly was a sale with the right of redemption, and it is not material, whether it was a sale with the right of redemption under statutes of Louisiana, or some other

right of redemption. All that the Bankruptcy Statute requires, is that it be a sale with the right of redemption.

But petitioner contends that the agreement of the parties does not come within the technical language of the Article of the Louisiana Civil Code, governing contracts of sale with the right of redemption. The right of redemption is defined by *Article 2567 of the Louisiana Civil Code*, as follows:

“The right of redemption is an agreement or paction, by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it.”

It is argued, that the agreement of the parties does not evidence a reservation on the part of the Respondent, but on the other hand a grant from the petitioner.

Petitioner cites the case of *Pitts, et al., v. Lewis*, 7 La. 552, which held, that the reservation must be made in the deed, and could not be made by a subsequent contract. It is conceded that this decision has been overruled to the extent of recognizing that the right of redemption may be made by counter letter. This case is simply not in point.

There is next cited the case of *Glover v. Abney*, 160 La. 177, 106 So. 735. This case is easily differentiated from the case now before the Court. In the cited case, Mary Glover and Barcus Hubbard sold the land to Zack Abney for a consideration of Seventeen Hundred Fifty and No/100 (\$1750.00) Dollars, cash in hand paid. The same day, or the following day, Zack Abney executed a

contract in favor of Barcus Hubbard, in which he obligated himself to convey not only his interest in the land, but also the interest of Mary Glover, his co-vendor. The parties to the second contract were not the same as the parties to the deed. There is no similarity between the conditions under which the deeds were executed in the cited case, and the case now before the Court.

To point out the difference, let us revert to the above cited articles of the Louisiana Civil Code, which says:

"The right of redemption is an agreement or paction by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it."

Let us again quote from the contract:

"It being the intended purpose of this agreement to permit the said Kirby to re-purchase this property at any time on or before December 31st, 1938, upon him, the said Kirby, re-imbursing to the Bank all money invested in said property by said Bank together with interest as aforesaid thereon."

When the deed and contract were signed, Kirby, the respondent, had the right to take his land back by returning the price paid for it, which was "all the money invested by the Bank in the property with interest." This was a right that he required before he would sign the deed. What plainer reservation could he have made?

The law requires no specific language for a reservation of this right and the courts in construing the above quoted Article of the Civil Code have not limited themselves to any particular words.

We refer the court to the very recent case of *Baker v. Patton*, 191 La. 784, 186 So. 336.

We also refer the court to the case of *Harper v. Citizens Bank*, 51 La. An. 513, 25 So. 466, wherein the court used this language:

"This is followed by a clause setting forth that the right and privilege of redeeming and buying back the property was given to the Vendors, which right was to continue in force up to the First of February, 1893."

Under petitioner's construction of the Article, this decision is wrong. The contract did not use the word "reserved" but on the other hand, it stated that the right of buying back was given by the Vendor. The argument that the provision in the contract giving Kirby the right to repurchase the property was a grant and is not a reservation is too technical for serious consideration.

The Trial Court very clearly and definitely decided the point in these words:

"In my opinion, the right to redeem was created by reservation as the two contracts were executed on the same day and appear to have been a continuous act.

In view of the foregoing, I find that the deed and contract are, under the law of Louisiana, a sale with reservation of a right to redeem."

It is argued that the contract fails to come under the provisions of the Article of the Civil Code, for the reason that the consideration for the re-purchase or redemption is different from the consideration for the sale of the land.

It is argued, that the total consideration stated in the deed was Eight Thousand Three Hundred Forty-four and 35/100 (\$8,344.35) Dollars, whereas, the price to be paid was for the redemption of the land totaled Nine Thousand, Nine Hundred Ten and 50/100 (\$9,910.50) Dollars. Again we quote from the contract, as shown on page 14 et seq. of the printed record:

"Whereas, the consideration as recited in said deed and conveyance was the assumption by said bank of the payment and satisfaction of all mortgages and encumbrances affecting said property sold and particularly that certain mortgage in favor of The Federal Land Bank of New Orleans, the full amount thereof, including all interest and costs, being the sum of \$6344.31. In addition, the said Catahoula Bank assumed as part of the purchase price that certain mortgage indebtedness affecting said property and in favor of said Catahoula Bank, the same being the sum of \$250.00. That in addition it is here acknowledged and admitted that said Catahoula Bank was required to pay the sum of \$1066.19 in order to secure the cancellation of certain judgment encumbrances affecting said property. *All of which being the consideration for said transfer and sale and all amounting to the total sum of \$9,910.50.*"

The point, that there was one consideration for the original sale and another consideration for the redemption of the land, vanishes when the record is consulted.

The Trial Court having found that the transaction between the parties, as evidenced by the deed and counter contract, is a sale with the right of redemption, it follows that the power of the Court to grant an extension of time

for the redemption of the land is certainly given by the Bankruptcy Act. Section (n) of this act reads as follows:

"The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under this section, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, *including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired*, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition."

From the above quoted section the following is clear:

(1) The farmer and all his property come under the exclusive jurisdiction of this Court.

(2) The jurisdiction of the Court extends to all real and personal property and any equity or right in any such property including contracts for purchase, contracts for deed, or conditional sales contracts, the right or equity of redemption where the period of redemption has not or had not expired, and where a deed of trust given as security, or where the sale had not been confirmed.

The position of the petitioner is that the right of redemption applies only to rights given by state statutes to redeem after the land had been sold at a forced and public sale. This is contrary to the above quoted statute

which covers contracts for purchase, contracts for deed, or conditional sales contracts, and the right or equity of redemption. To say that right of redemption applies only to forced sales under state statutes is to say that this phase of the Bankruptcy Statute is inoperative in the State of Louisiana, and therefore not a uniform statute. If there is one indispensable feature to a statute of bankruptcy, that feature is uniformity. Under the Constitution Congress has the right to pass a uniform Bankruptcy Act.

In the case now under consideration, the parties had entered into a contract, and under the laws of this state, contracts entered into have the effect of laws between the parties. We fail to see any difference between the rights of parties under a contract to redeem a piece of property voluntarily given to satisfy a debt and the rights of a party to redeem property taken from him by a forced sale, when the state statute gives a period of redemption for that property. The law maker certainly did not make any distinction, for the statute above quoted extends to contracts for purchase, contracts for deed, and conditional sales contracts, and for the right of redemption. The Courts have approved other statutes of similar nature and have given them a broad and liberal interpretation so as to effectuate the intent of Congress.

Cont. Ill. Nat. Bank and Trust Co. v. Chicago R. I. & P. R. R. Co., 294 U. S. 648, 79 L. Ed. 1110;

Wright v. Vinton Mt. Trust Bank, 300 U. S. 440, 81 L. Ed. 739.

Since the statute that we have quoted is free of any ambiguities and since it, in plain language, covers the case before the Court, we deem that further argument is

unnecessary to show that the petitioner in this case is entitled to redeem his property.

This leaves only the constitutional question raised by petitioner, that is, that the Act of Congress violates Articles 5 and 14 of the Federal Constitution in that they constitute a deprivation of respondent's vested rights under a contract legally and validly entered into and would constitute a deprivation of respondent's vested rights and a taking of its property without due process of law.

The answer to this contention is found in the case of *Wright v. Union Central Life Insurance Company*, 304 U. S. 517, 82 L. Ed. 1501. The Court said:

"If the argument is that Congress has no power to alter property rights, because the regulation of rights in property is a matter reserved to the States, it is futile. Bankruptcy proceedings constantly modify and affect the property rights established by state law. A familiar instance is the invalidation of transfers working a preference, though valid under state law when made. Recent decisions illustrate other instances:

'A court of Bankruptcy may affect the interests of lien holders in many ways. To carry out the purposes of the Bankruptcy Act, it may direct that all liens upon property forming a part of the bankrupt's estate be marshalled; or that the property be sold free of encumbrances and the rights of all lien holders be transferred to the proceeds of the sale. *Van Huffel vs. Harkelrode*, 284 U. S. 225, 227, 76 L. Ed. 256, 258, 52 S. Ct. 115, 78 A. L. R. 453, 18 Am. Bankr. Rep. (N. S.) 730. Despite the peremptory terms of a pledge, it may enjoin sale of the collateral, if it finds that the sale would hinder or delay preparation or consummation of a

plan of reorganization. Continental Illinois National Bank & Trust Co. vs. Chicago, R. I. & P. R. Co., 294 U. S. 648, 680, 681, 79 L. Ed. 1110, 1130, 1131, 55 S. Ct. 595, 27 Am. Bankr. Rep. (N. S.) 715. It may enjoin like action by a mortgagee which would defeat the purpose of (#75) subsection (s) to effect rehabilitation of the former mortgagor.' Wright vs. Vinton Mountain Trust Bank, 300 U. S. at 470, 61 L. Ed. 747, 57 S. Ct. 556, 112 A. L. R. 1455, 33 Am. Bankr. Rep. (N. S.) 353.

"Such action does not indicate a disregard of the property rights created by state law. The state law still establishes the norm to which Congress must substantially adhere; a serious departure from this norm, i. e., from the quality of the property rights created by the state courts, has led to condemnation of the Federal action as constituting a deprivation of property without due process.

"Property rights do not gain any absolute inviolability in the bankruptcy courts because created and protected by state law. Most property rights are so created and protected. But if Congress is acting within its bankruptcy power, it may authorize the bankruptcy court to affect these property rights, provided the limitations of the due process clause are observed."

We respectfully submit that the opinion of the Trial Court and of the Circuit Court of Appeals covers the case, and the Writ should be refused.

Respectfully submitted,

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